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No. 94-938

In the Supreme Court of the United States

OCTOBER TERM, 1994

LORNA KREINES, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a party who prevails against federal employees sued in their individual capacities under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), is entitled to an award of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A), when the government has elected to supply counsel to the defendants and to pay the award of damages.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B15[1]) is reported at 33 F.3d 1105. The opinion of the district court (Pet. App. A1-A7) is reported at 812 F. Supp. 164.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1994. The petition for a writ of certiorari was filed on November 23, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] Petitioner has not numbered the pages in her appendices. For the Court's convenience, we cite the pages as if numbered sequentially within each appendix.

STATEMENT

1. The Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), provides for the award to qualified prevailing parties of attorney's fees and other expenses incurred "in any civil action * * * brought by or against the United States * * * unless * * * the position of the United States was substantially justified" (28 U.S.C. 2412(d)(1)(A)). The term "United States" includes "any official of the United States acting in his or her official capacity" (28 U.S.C. 2412(d)(2)(C)).

2. Petitioner, alleging that a violation of her Fourth Amendment rights occurred when federal agents searched her apartment, filed a complaint asserting claims against the United States under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, and against the agents in their individual capacities under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Tort Claims Act claims were tried before the district court, and the government prevailed. The *Bivens* claims were tried before a jury, which awarded petitioner $7,000 in damages against each of two individual defendants, agents Jack McMenimen and Wayne Yamashita. Pet. App. B3. That verdict was affirmed on appeal (959 F.2d 834 (1992)). The government elected to represent the federal agents in the *Bivens* action, and also elected to pay the $14,000 compensatory damage award.[2]

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[2] Representation may be provided to a defendant in a *Bivens* action when the Attorney General or his designee determines that to do so is in "the interest of the United States." 28 C.F.R. 50.15(a). The decision as to whether in a *Bivens* case to pay a judgment against a defendant employee is within the discretion of the employee's department or agency. *E.g.*, 28 C.F.R. 50.15(c).

On the basis of her success in the *Bivens* action, petitioner then moved in district court for an award of EAJA fees against the United States. She sought approximately $242,500 in attorney's fees and $15,000 in costs. Pet. App. B4. The district court denied petitioner's motion, finding that she was not eligible for an EAJA award because she had not prevailed in a civil action "against the United States," as that term is defined in EAJA, but only in an action against the agents in their individual capacities. *Id.* at A5-A7.

3. The court of appeals affirmed. Pet. App. B1-B15. The court rejected petitioner's argument that her *Bivens* claim was "against the United States" for EAJA purposes because the individual defendants were acting in their official capacities at the time of the search. *Id.* at B6-B8. Because the EAJA fee provision (28 U.S.C. 2412(d)(1)(A)) authorizes an award of fees "in any civil action * * * brought by or against the United States," the court concluded that EAJA's applicability "depends on the nature of the civil action, not the nature of the government actor's conduct." Pet. App. B7. Petitioner is not entitled to EAJA fees because her "action is not a civil action brought by or against the United States: it is an action against individual federal officers." *Ibid.* The court found further support for this view in *Kentucky* v. *Graham*, 473 U.S. 159, 165-168 (1985) (explaining that "[p]ersonal-capacity suits" seek "to impose personal liability upon a government official for actions he takes under color of state law," while "[o]fficial-capacity" suits involve "only another way of pleading an action against an entity of which an officer is an agent"). Pet. App. B7-B8.[3]

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[3] The court rejected petitioner's claim that *Stafford* v. *Briggs*, 444 U.S. 527, 542 n.10 (1980), indicates that the fact that the

ARGUMENT

EAJA permits the award of attorney's fees to the prevailing party "in any civil action * * * brought by or against the United States" (28 U.S.C. 2412(d)(1)(A)), and defines "United States" to include "any official of the United States acting in his or her official capacity" (28 U.S.C. 2412(d)(2)(C)). The court of appeals correctly concluded that this statutory language does not permit the award of attorney's fees in *Bivens* actions, which are suits against federal officials in their personal, not official, capacities.[4] That decision accords with the conclusion of every other court of appeals that has addressed the issue.[5] It is also consistent with the

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government paid the judgment in the *Bivens* action requires the conclusion that that action was against the government (Pet. App. B8-B11). The court also found the legislative history upon which petitioner relies (Pet. 30-31) to be "vague" and "cryptic", and wholly insufficient to overcome the "reasonably clear" contrary statutory language. Pet. App. B12-B13. Finally, the court rejected petitioner's attempt to analogize the EAJA fee provision to 42 U.S.C. 1988. Pet. App. B14-B15. Petitioner makes no argument based on Section 1988 in this Court.

[4] *Bivens* actions are not claims against the United States. As Justice Harlan, concurring in *Bivens*, stated, "[h]owever desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit." 403 U.S. at 410. The United States is not a party to a *Bivens* claim; a *Bivens* action involves seeking monetary redress from federal officers only in their individual capacities, based on their alleged deprivation of a constitutional right while "clothed with the authority of the Federal Government." 403 U.S. at 395.

[5] *United States* v. *Property Located at 4880 S.E. Dixie Highway*, 838 F.2d 1558, 1563 n.11 and accompanying text (11th Cir. 1988); *Bergman* v. *United States*, 844 F.2d 353, 355-356 (6th Cir. 1988); *Saxner* v. *Benson*, 727 F.2d 669, 673 (7th Cir. 1984), aff'd *sub nom. Cleavinger* v. *Saxner*, 474 U.S. 193 (1985). Cf.

analysis in this Court's opinions, and with established principles of statutory interpretation.

1. In *Kentucky* v. *Graham*, 473 U.S. 159 (1985), this Court unanimously rejected an attempt to recover attorney's fees from a governmental entity (the State) on the basis of claimants' success in a suit against the State's employees in their personal capacities under 42 U.S.C. 1983.[6] As this Court explained (473 U.S. at 165), "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, [the statute] does not authorize a fee award against that defendant."[7] Accord *Independent Federation of Flight Attendants* v. *Zipes*, 491 U.S. 754, 762 (1989) (fee claim under 42 U.S.C. 2000e-5(k)); *Farrar* v. *Hobby*, 113 S. Ct. 566, 572, 573 (1992) (quoting *Graham*, and also noting that "plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought").

The Court in *Graham*, 473 U.S. at 165, emphasized the importance in fee cases of "careful adherence to the distinction between personal-and official-capacity suits," explaining that "[p]ersonal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state [or federal] law. Official-capacity suits, in contrast, 'generally represent only

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Lauritzen v. *Lehman*, 736 F.2d 550, 553 (9th Cir. 1984) (reaching same conclusion with regard to related fee-shifting provision in 28 U.S.C. 2412(b)).

[6] The plaintiffs in *Graham* sought attorney's fees under 42 U.S.C. 1988.

[7] In this case, the government prevailed on the merits in the FTCA portion of the case, where it was the defendant. Pet. App. A3.

another way of pleading an action against an entity of which an officer is an agent.' * * * Thus, while an award of damages against an official in his personal capacity can be executed only against an official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself." *Id.* at 165-166 (citations omitted).[8]

Petitioner ignores this analysis, asserting instead that the dispositive questions are whether the government in fact (1) defended the officials and (2) paid the damages judgment. Pet. 16.[9] Contrary to petitioner's argument (*ibid.*), neither *Graham*, *Hutto* v. *Finney*, 437 U.S. 678 (1978), nor *Stafford* v. *Briggs*, 444 U.S. 527 (1980), supports this assertion. *Graham*'s analysis did not turn on whether the government voluntarily repre-

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[8] The fact that the government exercised its discretion to defend and to pay the judgment on behalf of defendants in this case does not change the fact that the suit was against the individual defendants.

[9] Petitioner also suggests (Pet. 13), that whether a law suit is against a government employee "in his or her official capacity" for EAJA fee liability purposes depends, not on the capacity in which the official is sued, but instead on the official's capacity during the conduct that gave rise to the civil action. Since a *Bivens* claim always alleges a deprivation of constitutional rights by "a federal agent acting under color of his authority," petitioner's analysis would subject all successful *Bivens* claims to EAJA. This Court recently rejected a similar analysis in a different context in *Hafer* v. *Melo*, 502 U.S. 21, 27 (1991): "[Petitioner] seeks to overcome the distinction between official- and personal-capacity suits by arguing that * * * liability turns not on the capacity in which [government] officials are sued, but on the capacity in which they acted when injuring the plaintiff. * * * [W]e find [this argument] both unpersuasive as an interpretation of [the statute] and foreclosed by our prior decisions" (citing, *inter alia*, *Bivens*).

sented the charged officials and voluntarily paid the award against them. The *Graham* defendants were not represented by the State (see 473 U.S. at 162 & n.4), and there was no suggestion that the State agreed to pay any award that might be assessed against them personally. In *Hutto*, the state officials were sued in their official capacities (437 U.S. at 678), and the Court concluded that for that reason, as well as because they were represented by the State Attorney General, "it is obvious that the [fee] award will be paid with state funds." 437 U.S. at 693. *Hutto* does not consider the question of fee awards in individual-capacity suits.

To the extent that *Stafford* is relevant to the current issue, it supports the decision below. In *Stafford*, the Court interpreted the Mandamus and Venue Act of 1962, which provides for expanded venue in a civil action in which a federal official is sued "in his official capacity or under color of legal authority" (28 U.S.C. 1391(e)). Relying on the Act's legislative history, the Court concluded that the "under color" language was added to assure that the provision applied, not only to suits against federal officials in their official capacity, but also to mandamus actions against officials in their individual capacities to compel them to perform duties owed to plaintiffs (444 U.S. at 542-543).[10] The Court explicitly rejected respondents' contention that the "under color" language included "suits for money damages for which an individual office-holder may be found personally liable." (444 U.S. at 543-545). The EAJA definition of covered

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[10] Petitioner overlooks the "under color" language at issue in *Stafford*, although the Court's opinion turns on it. See, *e.g.*, 444 U.S. at 539, noting that this language was added to include certain "individual capacity" cases that would otherwise be outside the statutory language.

actions contains no language similar to the "under color" provision of the Mandamus and Venue Act of 1962. *Stafford* thus supports the proposition that suits against federal officials in their individual capacities are not covered by EAJA. Nothing in *Stafford* can possibly be read to suggest that suits like this one, in which plaintiff seeks a monetary award, are covered under EAJA.[11]

2. Under EAJA's express terms, attorney's fees can be awarded only to a party who has prevailed in an action "brought by or against the United States." 28 U.S.C. 2412(d)(1)(A). "United States" is defined to include "any official of the United States acting in his or her official capacity" (28 U.S.C. 2412(d)(2)(C)). The provision thus plainly applies only to actions *brought* against officers acting in their official capacity, *i.e.* to cases where the official is a defendant in that capacity. By its terms, EAJA is concerned with the identity of the defendant in the action, not with the circumstances that allegedly gave rise to liability.[12]

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[11] Petitioner relies on a footnote in *Stafford* stating that "the dispositive inquiry [under the Venue Act] is 'who will pay the judgment'" (444 U.S. at 542 n.10). The Court goes on to explain, however, that the Act does not apply in *Stafford* because "it is against individuals and not against the Government that a money judgment is sought" (*ibid.*). The footnote thus suggests that the demand in the complaint is dispositive, not whether the government eventually elects to pay a judgment entered against private individuals. That conclusion is confirmed by the fact that it would be impracticable to make venue decisions turn on a matter (who actually pays the judgment) that can only be ascertained at the end of the case if the government official loses.

[12] EAJA is a limited waiver of sovereign immunity. See *Pierce* v. *Underwood*, 487 U.S. 552, 575 (1988) (Brennan, J., concurring). Accordingly, it must be strictly construed. *United States Dep't of Energy* v. *Ohio*, 112 S. Ct. 1627, 1633 (1992); *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991).

Because the language of EAJA is clear, there is no need to resort to its legislative history.[13] As the court of appeals recognized (Pet. App. B12-B13), that history is vague and cryptic. Petitioner relies (Pet. 30) on a passing comment in a committee report that states that EAJA "applies to all civil actions [against the United States] except those sounding in tort (but does not exclude Constitutional torts)." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 18 (1980). The court of appeals hypothesized that "the reference to 'constitutional torts' * * * may simply refer to injunction actions against government employees in their official capacity for wrongful or tortious conduct" (Pet. App. B12). The reference is, in any event, insufficient to overcome the plain statutory language.

3. Finally, petitioner argues that the purposes of EAJA would be furthered by providing eligibility for attorney's fees to successful plaintiffs in *Bivens* cases in which the government elects to provide the employee with counsel and to pay any resulting judgment (Pet. 33-37). That argument is appropriate for consideration by Congress, not this Court. *Ardestani* v. *INS*, 502 U.S. 129, 138 (1991) ("[I]t is the province of Congress, not this Court, to decide whether to bring [additional] proceedings within the scope of [EAJA]."). [14]

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[13] See *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992); *Ardestani* v. *INS*, 502 U.S. 129, 135-136 (1991); *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (citing *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

[14] We note, however, that it is at least debatable whether it is a wise policy to burden the government's discretionary decisions to provide counsel and indemnify federal employees sued in *Bivens* actions with the prospect of government liability for plaintiffs'

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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attorney's fees, which may, as here (Pet. 8-9), far exceed the damage award.